

FILED
COURT OF APPEALS
DIVISION II

2017 JAN 13 PM 2:43

STATE OF WASHINGTON

BY  DEPUTY

NO. 49565-1-II

**COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION II**

EOR, INC,

Appellant,

v.

ROGER BELERIVE AND LINDSAY BELLERIVE,

Respondents.

APPELLANTS' BRIEF

**Michael W. Johns
WSBA No. 22054
Attorneys for Appellants**

**ROBERTS JOHNS & HEMPHILL, PLLC
7525 Pioneer Way, Suite 202
Gig Harbor, WA 98335
(253) 858-8606**

TABLE OF CONTENTS

I.	ASSIGNMENTS OF ERRORS.....	1
II.	STATEMENT OF THE CASE.....	3
III.	ARGUMENT	8
	A. The Trial Court Erred in Determining There Were Three “Major Issues” To Consider In Deciding The Prevailing Party.....	9
	B. The Trial Court Erred In Determining That The Claims The Bellerives Prevailed On “Arose” Out Of The Parties’ Contracts	11
	C. The Bellerives Could Not Be Deemed The Substantially Prevailing Party Based On Their Limited Recovery	13
	D. Even If The Bellerives Had Been The Prevailing Party, They Would Only Be Entitled To The Reasonable Attorney’s Fees They Incurred Specifically Related To Their Successful Claims.	16
	E. The Amount Of Fees Claimed By The Bellerives Was Excessive	18
	E. Request for Attorney’s Fees and Costs	18
IV.	CONCLUSION.....	19

TABLE OF AUTHORITIES

CASES

<u>City of Seattle v. McCready,</u> 131 Wash.2d 266, 275, 931 P.2d 156 (1997).....	9
<u>Dave Johnson Ins., Inc. v. Wright,</u> 67 Wn.App. 758, 782-784, 275 P.3d 339 (2012).....	13
<u>Eagle Point Condo. Owners Ass'n v. Coy,</u> 102 Wash.App. 697, 706, 9 P.3d 898 (2000).....	9
<u>Edmonds v. John L. Scott Real Estate, Inc.,</u> 87 Wn.App. 834, 942 P.2d 1072 (1997).....	11
<u>Granite Equip. Leasing Corp. v. Hutton,</u> 84 Wash.2d 320, 327, 525 P.2d 223 (1974).....	19
<u>Greenbank Beach and Boat Club, Inc. v. Bunney,</u> 168 Wash.App. 517, 524, 280 P.3d 1133 (2012).....	8
<u>In re Marriage of Littlefield,</u> 133 Wn.2d 39, 46-47, 940 P.2d 1362 1997).....	8
<u>In re Parentage of Schroeder,</u> 106 Wash.App. 343, 349, 22 P.3d 1280 (2001).....	8
<u>King County v. Squire Inv. Co.,</u> 59 Wn.App. 888, 897, 801 P.2d 1022 (1990).....	9, 17
<u>Mahler v. Szucs,</u> 135 Wn.2d 398, 433, 957 P.3d 632 (1998).....	18
<u>Marassi v. Lau,</u> 71 Wn.App. 912, 917, 859 P.2d 605 (1993).....	13
<u>Marine Enters., Inc. v. Security Pac. Trading Corp.,</u> 50 Wash.App. 768, 772, 750 P.2d 1290 (1988).....	14

<u>McGary v. Westlake Investors,</u> 99 Wash.2d 280, 288, 661 P.2d 971 (1983).....	14
<u>Miotke v. Spokane,</u> 101 Wash.2d 307, 338, 678 P.2d 803 (1984).....	9
<u>Puget Sound Serv. Corp. v. Bush,</u> 45 Wash.App. 312, 724 P.2d 1127 (1986).....	14
<u>Riss v. Angel,</u> 80 Wash.App. 553, 563, 912 P.2d 1028 (1996).....	9, 13
<u>Rowe v. Floyd,</u> 29 Wash.App. 532, 535–36, 629 P.2d 925 (1981).....	14
<u>Smith v. Behr Process Corp.,</u> 113 Wn.App. 306, 54 P.3d 665 (2002).....	16
<u>Tallman v. Durussel,</u> 44 Wash.App. 181, 185, 721 P.2d 985 (1986).....	14
<u>Wachovia SBA Lending, Inc. v. Kraft,</u> 165 Wn.2d 481, 490–92, 200 P.3d 683 (2009).....	14
<u>West Coast Stationary Eng'rs Welfare Fund v. Kennewick,</u> 39 Wash.App. 466, 477, 694 P.2d 1101 (1985).....	19

OTHER REFERENCES

RAP 18.1.....	18
RCW 4.84.330.....	13, 14
RPC 1.5(a)	18

I.
ASSIGNMENTS OF ERROR

Appellant EOR, Inc. (hereafter referred to as "EOR") assigns error to the Findings of Fact and Conclusions of Law, Order on Award of Plaintiff's Attorney's Fees and Costs, and the Judgment entered on October 14, 2016, and specifically as follows:

1. Finding of Fact 25 that the Respondents Roger and Lindsay Bellerive (hereinafter referred to collectively as the "Bellerives") incurred reasonable attorney's fees in the amount of \$75,000.00 and were the prevailing party.
2. Conclusion of Law 6 that there were three major issues central to this matter and that as the prevailing party on two of those identified issues the Bellerives were the prevailing party.
3. Conclusion of Law 8 that the Settlement Agreement and Purchase Agreement were central to the "major issues" identified in Conclusion of Law 6 and that an award of attorney's fees and costs was appropriate because the contracts were central to the existence of the claims.
4. Conclusion of Law 9 that "major issues" identified in Conclusion of Law 6 constituted actions on a contract because they arose out of the parties' Settlement Agreement and Purchase Agreement.

5. Conclusion of Law 12 that the Bellerives should be awarded reasonable attorney's fees in the amount of \$75,000.00.
6. Conclusion of Law 13 that after applying an offset of \$25,000.00 attributable to EOR's defense of claims on which the Bellerives did not prevail, the Bellerives should be awarded a net fee award in the amount of \$50,000.00 as the prevailing party in the matter.
7. The Judgment granting the Bellerives an award of attorney's fees in the amount of \$50,000.00 and costs in the amount of \$306.00 against EOR.

ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Did the trial court err in determining a party was entitled to its attorney's fees for claims that were not based on the parties' contracts?
2. Did the trial court err in determining that the Bellerives claims "arose" out of the parties' contracts?
3. Did the trial court err in determining that the Bellerives were the substantially prevailing party at trial?
4. Did the trial court err in awarding the Bellerives \$50,000.00 in attorney's fees and \$306.00 in costs against EOR?

II.
STATEMENT OF THE CASE

On or about November 21, 2013 the Bellerives and EOR entered into a Real Estate Purchase and Sale Agreement (the "Purchase Agreement") for the construction and purchase of a custom-built home located at 5314 69th St. NW, Gig Harbor, Washington. (Paragraph 2.1 of Complaint, CP 1-9; Ex. 359).

The Purchase Agreement included a Pre-Sale Addendum that provided the Bellerives would pay in advance for any changes to the work that they desired, and that such payments would be non-refundable. (Ex. 359) An additional Addendum, Addendum B to the Purchase Agreement, provided that the \$17,500.00 earnest money deposit would be converted into a non-refundable retainer upon EOR's application for the building permit for the project. (Ex. 359) EOR applied for the building permit on March 31, 2014, which was subsequently issued, and construction on the home commenced immediately thereafter. (Ex. 21) EOR completed the house and Pierce County issued the certificate of occupancy on February 27, 2015.

As the house was nearing completion, the parties had disagreements regarding a number of issues, including claimed delays and the final cost of the home. On June 4, 2015, the parties

entered into a Settlement Agreement and resolved all of their issues. The parties further released each other from all claims arising prior to the date of the Settlement Agreement. (Ex. 170)

The Settlement Agreement extended the closing date to June 19, 2015. Closing by the agreed date was very important because with the delays EOR's loan was overdue and needed to be paid. Through no fault of EOR, the Bellerives failed to close by the agreed date and the Purchase Agreement expired. (Paragraphs 8 and 9 of Order on Defendant's Motion for Summary Judgment, CP 21-26) EOR continued to market the home for sale and when the parties could not agree on the terms of an additional extension, EOR entered into a new purchase and sale agreement with new buyers. In order to frustrate that sale, and despite having expressly released all claims arising prior to the date of the Settlement Agreement, the Bellerives filed this lawsuit and recorded a lis pendens against the property. (Paragraph 10 of Summary Judgment Order, CP 21-26)

In their complaint the Bellerives asserted a numerous claims, including breach of contract, violations of the Consumer Protection Act, bond claims and various equitable claims. (CP 1-9). In addition, the Bellerives made a claim for specific performance. EOR answered, denied the Bellerives' claims and asserted a counterclaim

for damages as a result of the Bellerives recording a lis pendens. (CP 12-20).

Following a continuance to allow the Bellerives to conduct additional discovery, the Trial Court granted EOR's Motion for Summary Judgment. (CP 21-26) The Trial Court determined that EOR had fully performed its contractual obligations as of the June 19, 2015 closing date (CP 24) and dismissed the Bellerives' Consumer Protection Act, bond, promissory estoppel and specific performance claims with prejudice and ordered that the Bellerives release their lis pendens against the property. (CP 26) The order reserved for trial only the Bellerives' claims for the return of monies, property or services rendered or paid to EOR based on contract, quantum meruit or unjust enrichment. (CP 26)

Once the Bellerives released the lis pendens, EOR immediately closed and paid its lender. The Bellerives then filed an amended complaint and for the first time claimed to own certain appliances and other items of personal property in the home. (Paragraph 2.9 of Amended Complaint, CP 30). Based on that claim, the Bellerives added an additional cause of action, for conversion of chattel. (Section VIII of Amended Complaint, CP 35).

The case went to trial on June 23 through June 27, 2016.

Although the Bellerives' asserted in their complaint their claims totaled "approximately \$100,000.00", even after the dismissal of their specific performance claim and their abandonment of the earnest money claim, the Bellerives still sought significant damages totaling \$79,032.49. (Ex. 360).

The Trial Court subsequently determined that the Settlement Agreement was valid and enforceable, and that the Bellerives had failed to sustain their burden of proof on their breach of contract claims, which it dismissed (Conclusions of Law 2, 3 and 7, CP 211-220). The Trial Court awarded the Bellerives \$3,160.00 of the \$7,900.00 they claimed for labor performed by Mr. Bellerive to improve the landscaping of the property. (Finding of Fact 9 and 10, Conclusion of Law 4, CP 211-220) And the trial court awarded the Bellerives \$10,000.00 of the \$14,010.62 they had claimed for the value of the appliances they had purchased. (Finding of Fact 8, Conclusion of Law 4, CP 211-220) The Trial Court did not award these damages under the theory argued by the Bellerives, conversion, but instead determined that EOR had been unjustly enriched by its continued possession of the appliances. (Findings of Fact 24 and 25, Conclusions of Law 3 and 4, CP 211-220).

So the total amount awarded to the Bellerives on their

monetary claims, which they originally alleged were approximately \$100,000.00 and which they reduced at trial to \$79,032.49, was only \$13,160.00 (only 13% of their original claim and only 16.65% of their reduced claim at trial). The trial court also found that EOR had not met its burden to establish that it had sustained financial loss as a direct result of the Bellerives' lis pendens filing and dismissed EOR's counterclaim.

Following trial, the Bellerives moved for an award of attorney's fees under the parties' contracts, asserting that that they were the substantially prevailing party under those contracts. (CP 107-121) The Bellerives made this assertion despite: (1) the trial court having expressly dismissed their contract claims; (2) the Settlement Agreement expressly provided that that the Bellerives released any and all claims arising prior to the date of the Settlement Agreement and thus served to defeat the Bellerives' claims; and (3) they were only awarded a small fraction of the amount they had sought at trial (only \$13,160.00 out of their claimed \$79,032.49 in damages).

Nevertheless, the Trial Court determined that the Bellerives were the "substantially prevailing party" and that they were entitled to an award of their attorney's fees, which the Trial Court then offset

by a portion of the attorney's fees EOR had incurred in defending against the Bellerives' claims that were dismissed.

The Trial Court filed its Findings of Fact, Conclusions of Law and Order on Award of Attorney's Fees, and the Judgment, on October 14, 2016. EOR timely filed its notice of appeal on October 19, 2016.

III. ARGUMENT

A. Standard of Review

The appellate court reviews an award of attorney's fees for an abuse of discretion. Greenbank Beach and Boat Club, Inc. v. Bunney, 168 Wn.App. 517, 524, 280 P.3d 1133, *review denied*, 175 Wn.2d 1028, 291 P.3d 254 (2012). The trial court abuses its discretion if its decision is manifestly unreasonable or based on untenable grounds or untenable reasons. In re Marriage of Littlefield, 133 Wn.2d 39, 46-47, 940 P.2d 1362 (1997). A decision is manifestly unreasonable if, based on the facts and the applicable legal standard, the decision is outside the range of acceptable choices. In re Parentage of Schroeder, 106 Wn.App. 343, 349, 22 P.3d 1280 (2001).

Whether a party is a "prevailing party" is a mixed question of law and fact that the appellate court reviews under an error of law

standard. Eagle Point Condo. Owners Ass'n v. Coy, 102 Wn.App. 697, 706, 9 P.3d 898 (2000).

B. The Trial Court Erred in Determining There Were Three “Major Issues” To Consider In Deciding The Prevailing Party.

Washington follows the American Rule, which provides that “attorney fees are not available as *costs or damages* absent a contract, statute, or recognized ground in equity.” City of Seattle v. McCready, 131 Wn.2d 266, 275, 931 P.2d 156 (1997). Consequently, a “trial court may award attorney fees only where there is a contractual, statutory, or recognized equitable basis.” Riss v. Angel, 80 Wn.App. 553, 563, 912 P.2d 1028 (1996) (quoting Miotke v. Spokane, 101 Wn.2d 307, 338, 678 P.2d 803 (1984)).

In a case involving multiple claims, the court may only award attorney’s fees on the claims for which attorney fees are authorized. “It is not uncommon for lawsuits to involve some claims which allow for attorney fees with some claims that do not. In such cases the rule is well established that the prevailing party should be awarded attorney fees only for the legal work completed on the portion of the claim permitting such an award.” King County v. Squire Inv. Co., 59 Wn.App. 888, 897, 801 P.2d 1022 (1990).

In the present case, the Bellerives’ contract claims allowed for attorney’s fees pursuant to the terms of the parties’ contracts.

The Bellerives' equitable claims and conversion claims did not allow for attorney's fees, nor did EOR's claim for slander of title based on the Bellerives' lis pendens. Thus in determining which party was entitled to attorney's fees, the Trial Court should have determined which party prevailed on the Bellerives' contract claims only.

Instead, the Trial Court created a flawed framework for its analysis, one that entirely ignored which claims did or did not allow for an award of fees, by grouping the claims into "three major issues" – (1) the Bellerives' contractual claim for specific performance; (2) the Bellerives' claims for damages, regardless of the basis for that claim, i.e. contract, tort or equity; and (3) EOR's claim for slander of title, for which no attorney's fees could have been awarded.

Using this flawed framework, the Trial Court determined that the Bellerives were the "substantially prevailing party" because they prevailed on two of the "three major issues"; while their specific performance claim failed entirely, they recovered an award of damages (however small), and they defeated EOR's slander of title claim. This ignores the fact that attorney's fees could only have been awarded based on the contract claims, and the Trial Court expressly determined that the Bellerives' contract claims all failed and were dismissed. EOR prevailed entirely on those claims,

obtaining the dismissal of the Bellerives' specific performance claim on summary judgment and the dismissal of the Bellerives' remaining contract claims at trial.

C. The Trial Court Erred In Determining That The Claims The Bellerives Prevailed On “Arose” Out Of The Parties’ Contracts.

Despite having all of their contract claims dismissed, the Bellerives nonetheless argued they were entitled to an award of attorney’s fees based on Edmonds v. John L. Scott Real Estate, Inc., 87 Wn.App. 834, 942 P.2d 1072 (1997), which provides that if a tort action is based on a contract containing an attorney fee provision, then the prevailing party may be entitled to attorney fees. But the Bellerives did not prevail on any of the tort claims they asserted. Instead, the Court awarded them relief under the equitable doctrine of unjust enrichment.

Even if the Bellerives had prevailed on a tort claim, the Bellerives’ argument fails. A tort claim is only “based on a contract” if (1) the tort arose out of the contract; and (2) if the contract is central to the dispute. In Edmonds, the Appellate Court upheld an award of attorney fees to a plaintiff who sued for breach of fiduciary duty when her real estate broker failed to return her earnest money on termination of a transaction. The Court concluded that her action

was on a contract because her claims arose out of the duty created by her buyer/broker agreement and the broker's drafting of the earnest money agreement. Id. at 855-856.

In this case, the Trial Court expressly dismissed the Bellerives' contract claims because EOR had no contractual duty to reimburse the Bellerives for the value of the appliances or for the time Mr. Bellerive spent working on various tasks at the property. For that very reason, the Trial Court based its only award to the Bellerives on the theory of unjust enrichment.

Nor did EOR's slander of title claim "arise" out of the parties' contracts and it should not have been considered in determining who was the prevailing party. EOR's claim for damages for slander of title had nothing to with the parties' contracts, and instead turned on whether EOR could prove that it had sustained financial loss as a direct result of the Bellerives' lis pendens filing. To the extent that the parties' contracts were relevant to the Bellerives' lis pendens, EOR prevailed on the claim as the Trial Court ordered the Bellerives to release the lis pendens, precisely because the Trial Court expressly determined that EOR had "performed its contractual obligations under the parties' Agreement" and there was thus no possible basis for the Bellerives' specific performance claim.

In Dave Johnson Ins., Inc. v. Wright, 67 Wn.App. 758, 782-784, 275 P.3d 339 (2012), the Court of Appeals, Division II held that where an action is brought on a contract, but the case is resolved on equitable grounds, as it was here, no attorney's fees may be awarded based on the contract. The Court stated as follows:

"Although this suit began as a contract enforcement action, when the Johnsons sued for return of the insurance policies as corporate property under the written employment agreement, the trial court (and this court) resolved the case on equitable grounds. Accordingly, because the case is not resolved on the basis of enforcing a written contract provision, RCW 4.84.330, with its provision for reasonable attorney fees, has no application here. Thus, for the reasons discussed below, we hold that while Johnson has substantially prevailed, he may recover only statutory fees and costs."

Id. at 782.

D. The Bellerives Could Not Be Deemed The Substantially Prevailing Party Based On Their Limited Recovery.

The Bellerives' based their claim to be the prevailing party on the fact that they received a monetary award. Even if the equitable claims on which the Bellerives did prevail could provide the basis for an award of attorney's fees, the Bellerives would still not be deemed the prevailing party.

As a general rule, the prevailing party is one who receives an affirmative judgment in its favor. Riss v. Angel, 131 Wn.2d 612, 633, 934 P.2d 669 (1997). However, in Marassi v. Lau, 71 Wn.App. 912,

917, 859 P.2d 605 (1993), abrogated on other grounds by Wachovia SBA Lending, Inc. v. Kraft, 165 Wn.2d 481, 490–92, 200 P.3d 683 (2009), the Court of Appeals stated that where multiple and distinct claims were at issue, the trial court should take a “proportionality approach.”

When both parties to an action are afforded some measure of relief and there is no singularly prevailing party, neither party is entitled to attorney's fees under RCW 4.84.330. Rowe v. Floyd, 29 Wn.App. 532, 535–36, 629 P.2d 925 (1981). The determination as to who substantially prevails turns on the substance of the relief which is accorded the parties. Rowe, at 535 n. 4, 629 P.2d 925; see also McGary v. Westlake Investors, 99 Wn.2d 280, 288, 661 P.2d 971 (1983); Tallman v. Durussel, 44 Wn.App. 181, 185, 721 P.2d 985, review den'd, 106 Wn.2d 1013 (1986). In Puget Sound Serv. Corp. v. Bush, 45 Wn.App. 312, 724 P.2d 1127 (1986), where both parties prevailed on major issues, the Court held that there were no prevailing parties under RCW 4.84.330 and no fees were awarded. See also Marine Enters., Inc. v. Security Pac. Trading Corp., 50 Wash.App. 768, 772, 750 P.2d 1290, review denied, 111 Wn.2d 1013 (1988).

In this case, the Bellerives asserted numerous claims, including not just monetary damages but also specific performance. EOR was able to obtain the dismissal of their specific performance claim long before trial so as to be able to sell the home. The Bellerives' monetary claims initially included the return of their earnest money deposit in the amount of \$17,500.00, though they abandoned that claim at trial. Even after the dismissal of their specific performance claim prior to trial and their abandonment of the earnest money claim, their remaining claims asserted at trial totaled \$79,032.49.

\$33,684.94 of that \$79,032.49 was for signed change orders the Bellerives attempted to avoid at trial, but for which the Bellerives recovered nothing. (Ex. 360) They further claimed \$37,447.55 in "direct costs" consisting of 14 line items, for which the Bellerives received an award of only \$10,000.00 out of \$14,010.62 claimed for one line item of their claim, the appliances. (Ex. 360) The remainder of their claim was \$7,900.00 for labor performed by Mr. Bellerive, of which they were awarded recovered \$3,160.00 - 40% of the amount claimed. (Ex. 360)

Thus, even if there was a contract, statute, or recognized ground in equity providing a basis for the Bellerives' request for an

award of attorney's fees (and there is not), the Bellerives clearly were not the substantially prevailing party. They received an award of only 16.65% of the \$79,032.49 they sought at trial. They prevailed on none of their change order related claims, on only one of their 14 direct cost claims and received less than half they requested for the work Mr. Bellerive performed. And their specific performance claim was dismissed prior to trial. Given these facts, there is no possible basis for concluding that the Bellerives were the substantially prevailing party at trial.

E. Even If The Bellerives Had Been The Prevailing Party, They Would Only Be Entitled To The Reasonable Attorney's Fees They Incurred Specifically Related To Their Successful Claims.

When attorney fees are available on some claims but not others, or for some but not all of the work performed by the attorney, the trial court must take care to segregate the attorney's compensable hours from the non-compensable hours. Smith v. Behr Process Corp., 113 Wn.App. 306, 54 P.3d 665 (2002). In a case involving multiple claims, the court should award attorney fees only on the claims for which attorney fees are authorized. If a party recovers on some claims for which attorney fees are authorized and on some claims for which attorney fees are not authorized, the court

should limit the award accordingly. King County v. Squire Inv. Co., supra.

While the Bellerives successfully defended against EOR's slander of title claim, there is no basis for attorney fees defending against a slander of title claim. The Bellerives failed on all the claims dismissed on summary judgment, and on the overwhelming majority of the claims they asserted at trial. Thus, even if they had been the prevailing party on a claim for which attorney's fees were authorized, the Bellerives would only be entitled to a very small portion of the total fees they incurred in this matter.

Neither the Bellerives nor the Trial Court made any attempt to segregate out the time spent by the Bellerives' attorney's fees on their successful claims from the host of additional claims they asserted, but lost. Instead, the Bellerives asked for an award based on all the time spent by their attorneys in the case, totaling \$116,664.69. (CP 107 – 121, 122-155) The trial court awarded them \$75,000.00 of this amount without any explanation for the basis of that amount or how the Bellerives could have incurred \$75,000.00 on the two small claims on which they prevailed. In the absence of that analysis, the Trial Court's decision was arbitrary and capricious and must be reversed.

F. The Amount Of Fees Claimed By The Bellerives Was Excessive.

A prevailing party at trial is only entitled to an award of attorney's fees for a reasonable number of hours. Mahler v. Szucs, 135 Wn.2d 398, 433, 957 P.3d 632 (1998). Here, the Bellerives sought an award of \$116,664.69 for over 380 hours of attorney time and over 150 hours of paralegal time, which was grossly excessive. In contrast, EOR incurred a total of \$46,110.40 in attorney's fees and \$1,418.40 in costs through trial, representing 174 hours of attorney time, well less than half of the Bellerives' time spent or the amounts sought.

Considering the RPC 1.5(a) factors cited in Bellerives' motion for an award of fees, many of the Bellerives' claims asserted against EOR were dismissed on summary judgment many months prior to the trial and the remaining claims were not complex. The results obtained by the Bellerives - a total award of \$13,160.00 of the nearly \$80,000.00 sought at trial does not in any way justify incurring over \$116,000.00+ in attorney's fees. That is especially true when the Bellerives only prevailed on two of their numerous claims.

G. EOR's Request For Attorney's Fees And Costs.

Pursuant to RAP 18.1, EOR requests that it be awarded its attorney's fees and costs incurred on appeal.

The Trial Court awarded to the Bellerives their attorney's fees based on the contract, even though it dismissed all of the Bellerives' contract claims. Contractual authority as a basis for an award of attorney's fees at trial also supports such an award on appeal. West Coast Stationary Eng'rs Welfare Fund v. Kennewick, 39 Wn. App. 466, 477, 694 P.2d 1101 (1985). See also Granite Equip. Leasing Corp. v. Hutton, 84 Wn.2d 320, 327, 525 P.2d 223 (1974).

EOR respectfully requests that it be awarded the attorney's fees and costs that it has incurred on appeal to reverse the Trial Court's award of attorney's fees and costs to the Bellerives.

IV. **CONCLUSION**

The Trial Court abused its discretion in awarding any fees to the Bellerives and therefore this Court should reverse the Trial Court's award of attorney's fees to the Bellerives, and further that it award EOR its attorney's fees and costs incurred on this appeal.

Respectfully submitted this 13th day January, 2017.

ROBERTS JOHNS & HEMPHILL, PLLC

By: 

MICHAEL W. JOHNS, WSBA #22054
Attorneys for Appellant

FILED
COURT OF APPEALS
DIVISION II

2017 JAN 18 PM 2:14

STATE OF WASHINGTON

BY

DEPUTY

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

ROGER BELLERIVE and LINDSAY
BELLERIVE, husband and wife,

Respondents/Cross-Appellants,

v.

EOR, INC., a Washington corporation,

Appellant/Cross-Respondent.

NO. 49565-1-II

CERTIFICATE OF
SERVICE

The undersigned certifies under the penalty of perjury under the laws of the State of Washington that I am now and at all times herein mentioned, a citizen of the United States, a resident of the State of Washington, over the age of eighteen years, not a party to or interested in the above-entitled action, and competent to be a witness herein.

On the 13TH day of January, 2017 I caused to be served the APPELLANTS' BRIEF on the following individuals in the manner indicated:


CERTIFICATE OF SERVICE -- 1

ORIGINAL

Chad E. Ahrens
Thomas P. Quinlan
SMITH | ALLING P.S.
1501 Dock Street
Tacoma, WA 98402

(XX) Via Hand Delivered

SIGNED this 12 day of January, 2017, at Gig Harbor,
Washington.


MICHAEL W. JOHNS